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ECF CASE

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2. On January 4, 2012 – during a 20-day Senate recess -- President Barack Obama appointed Richard Cordray to the Consumer Financial Protection Bureau and three others to the National Labor Relations Board.

3. Questions surrounding the legality and justification for these appointments, made while the Senate continued to meet in pro forma sessions, generated extensive public debate almost immediately thereafter.

4. On January 12, 2012, the Department of Justice's Office of Legal Counsel released a January 6, 2012 Memorandum from Virginia Seitz to Kathryn Ruemmler, outlining the President's authority to make appointments during a Senate recess period in which pro forma sessions continued.

5. But this memorandum relies on other OLC memoranda that are still not available for public evaluation and scrutiny.

6. NYT duly filed a FOIA request seeking two specific documents cited in the January 6, 2012 OLC Memorandum: (1) Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* (Feb. 20, 2004) and (2) Memorandum to File from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic "Pro Forma Sessions"* (Jan. 9, 2009).

7. To date, DOJ has refused to release any such memoranda or any segregable portions, claiming them to be properly privileged.

### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §§552(a)(4)(B) and 28 U.S.C. §1331.

9. Venue is premised on the place of business of Plaintiffs and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

10. Because DOJ has failed to determine the pending administrative appeals in the time set by FOIA, NYT is deemed to have exhausted all administrative remedies as to each and is now entitled to appeal directly to the Court to enforce the dictates of FOIA pursuant to 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

11. Plaintiff The New York Times Company is the publisher of *The New York Times*. The weekday circulation of *The New York Times* is the highest in the nation among metropolitan dailies, at more than 900,000 daily, with 1.35 million on Sunday. The number of monthly U.S. unique visitors to NYTimes.com has exceeded 33 million.

12. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, N.Y.

13. Plaintiff Charlie Savage is a reporter for *The New York Times*.

14. Defendant DOJ is an agency of the federal government that has possession and control of the records sought by Plaintiffs' FOIA requests.

15. DOJ is the federal agency responsible for enforcing the law and defending the legal interests of the United States. The Office of Information Policy ("OIP"), a component entity of DOJ, is responsible for ensuring the agency's compliance with FOIA requests. The Office of Legal Counsel ("OLC"), a component entity of DOJ, assists the

Attorney General in his function as legal adviser to the President and all executive branch agencies.

16. DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1).

### **FACTS**

#### **The Memoranda Underlying The Times's FOIA Requests**

17. On January 4, 2012, President Barack Obama appointed Richard Cordray as director of the new Consumer Financial Protection Bureau. That same day, the President also named three members of the National Labor Relations Board.

18. These appointments took place in the midst of the Senate's annual winter break, which lasts for several weeks.

19. Because the House of Representatives did not grant the Senate permission to adjourn for greater than three days, however, the Senate held a pro forma session every third day during its break – putatively carving its lengthy recess into a sequence of short ones. Presidents have traditionally not made recess appointments during Senate recesses of fewer than 10 days.

20. The administration contended that, despite these pro forma sessions, the Senate was functionally on a recess of multiple weeks, at least for purposes of interpreting the President's recess appointment power.

21. But a number of commentators, academics, and former government officials debated the legal grounds permitting the President's ability to make appointments during a time in which the Senate formally considered itself to be meeting every third day, warning that the administration had set a precedent that future presidents could use to gut the confirmation process.

22. For example, Michael McConnell, a former federal judge, argued that “it is hard to imagine a plausible constitutional basis for the appointments.”

23. Others, such as John Elwood, former Senior Deputy for the Office of Legal Counsel, and Steven Bradbury, former Acting Attorney General of the Office of Legal Counsel, criticized the pro forma sessions as serving only “one purpose: to prevent the President from exercising his constitutional authority to make recess appointments.”

24. While noting the “scant judicial doctrine on judicial appointments,” Laurence Tribe, a Harvard Law Professor, envisioned the President’s authority to make recess appointments as constrained by limits, allowing the President to “resort to recess appointments of this kind only in instances of transparent and intolerable burdens on his authority.”

25. In light of this controversy and growing concern, some, such as Bruce Ackerman, a Yale Law School Professor, asked for any memoranda explaining the legal basis for these appointments to be released.

26. Shortly after, on January 12, 2012, the OLC published a memorandum from Virginia Seitz, Assistant Attorney General for the Office of Legal Counsel, to Kathryn Ruemmler, the White House Counsel, explaining the lawfulness of recess appointments.

27. The memorandum, titled *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, argues that Senate’s pro forma sessions during winter break could not prevent the President from exercising his constitutional power to appoint officials during a recess.

28. Still, some remained unpersuaded by the legal conclusions of the memorandum. For example, in a floor speech, Senator Charles Grassley of Iowa, the ranking Republican on the Senate Judiciary Committee, said it was “entirely unconvincing” that the President, rather than Congress, may determine whether it is really in session. He called the opinion “preposterous.”

29. In making its argument, the memorandum relies upon and cites several other OLC memoranda as support for its conclusion.

30. Two of these memoranda – the subject of Mr. Savage’s request – are not available for public scrutiny.

31. Without the disclosure of these two memoranda, the public remains unable to thoroughly evaluate key arguments made on an issue of great public concern: the constitutional limits of the President’s authority to make recess appointments and whether Congress may block such appointments by meeting in pro forma sessions during its breaks.

*Mr. Savage’s FOIA Request for Memoranda Related to Recess Appointments*

32. On February 14, 2012, Mr. Savage submitted a FOIA request to DOJ OLC seeking a copy of “two Office of Legal Counsel memoranda related to recess appointments: (1) Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* (Feb. 20, 2004) and (2) Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic “Pro Forma Sessions”* (Jan. 9, 2009).

33. By letter dated February 22, 2012, DOJ OLC denied Mr. Savage's request.

34. The DOJ OLC responded that they "have found the two documents that are responsive to your request," but that all responsive records were being withheld pursuant to FOIA Exemption 5 (§ 552(b)(5) (relating to information that is privileged).

35. DOJ OLC also responded that the documents are "protected by the deliberative process, attorney-client, and/or presidential communications privileges, and they are not appropriate for discretionary release at this time."

36. On February 24, 2012, NYT submitted to DOJ OIP its appeal of the denial of Mr. Savage's request.

37. More than twenty days have passed since NYT submitted its February 24, 2012 administrative appeal to DOJ OIP. NYT has received no further response to its appeal.

38. As a result, NYT is deemed to have exhausted its administrative remedies with regard to Mr. Savage's request.

#### **CAUSE OF ACTION**

39. NYT repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

40. DOJ, as an agency subject to FOIA, 5 U.S.C. § 552(f), must release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption under 5 U.S.C. § 552(a)(3).

41. DOJ has possession of two memoranda that support the legality of recess appointments.

42. Defendant has improperly withheld both memoranda under FOIA.

43. Memoranda containing legal analysis relied upon by the government and cited as authority in a document released to the public constitute a final determination of policy by the government and therefore are not deliberative materials and not properly subject to Exemption 5.

44. No other FOIA exemption applies to the requested documents.

45. Defendant's failure to provide the memoranda violates FOIA.

#### **REQUEST FOR RELIEF**

**WHEREFORE**, NYT respectfully requests that this Court:

- a. Expedite consideration of this Complaint pursuant to 28 U.S.C. § 1657;
- b. Declare that the memoranda requested by NYT are public under 5 U.S.C. § 552 and must be disclosed or, in the alternative, conduct an in camera review to determine whether any parts of the memoranda are properly public under FOIA;
- c. Order the DOJ to provide the memoranda, or such parts as the Court determines are public under FOIA, to NYT within twenty business days of this Court's order;



- d. Award NYT its costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and
- e. Grant NYT such other and further relief as the Court deems just and proper.

Dated: New York, New York  
April 24, 2012



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